

**BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

TASHA E. JOHNSON)
Petitioner,)
) SEAC NO. 05-13-034
vs.)
)
INDIANA DEPARTMENT OF)
WORKFORCE DEVELOPMENT)
Respondent.)

**ORDER DENYING
RESPONDENT'S MOTION TO DISMISS**

On July 31, 2013, Respondent Department of Workforce Development (“DWD”), by counsel, filed Respondent’s Motion for Dismissal (the “Motion”). Petitioner Johnson, pro se, filed her response to the Motion on August 2, 2013. At the request of the Administrative Law Judge (the “ALJ”), Respondent filed DWD’s Position on Exhaustion of Step II on August 20, 2013. Finally, Petitioner Johnson filed her Position on Exhaustion of Step I and II and designated evidence on August 29, 2013, and filed a further supplement/response on September 14, 2013. The matter is now ripe for ruling. The following findings of fact, conclusions of law and order are made. Respondent’s Motion is **DENIED** and the case will proceed to the merits.

I. Dismissal Motion Standard & Administrative Exhaustion

Dismissal proceedings test only the legal sufficiency of the complaint. *Right Reason Publications v. Silva*, 691 N.E.2d 1347, 1349 (Ind. Ct. App. 1998). All facts plead in the petitioner’s complaint and designated evidence, and reasonable inferences therefrom, are taken as true. *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007); *Huffman v. Office of Env’tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004); See also, Ind. Trial Rule 12(b)(1) and (6).

To have standing before the State Employees’ Appeals Commission (“SEAC”), a petitioner must first timely exhaust Step I with the appointing authority (here, Respondent DWD) and then timely exhaust Step II with the Indiana State Personnel Department (“SPD”). Timely exhaustion requires the petitioner to file a written complaint at Step I within thirty (30) days of reasonable discovery of the complained employment action. If the appointing authority denies

Step I, the petitioner may proceed to Step II within fifteen (15) calendar days. If Step II is denied, the petitioner may proceed to Step III “within fifteen (15) calendar days after the date the employee receives notice of the action taken by the [SPD] director or the director’s designee”. I.C. 4-15-2.2-42(e) (each step involves a filing to a different agency on a given timeframe).

Timely administrative exhaustion at each prior step is a petitioner’s threshold burden. I.C. 4-15-2.2-42 and I.C. 4-21.5-3. However, at the motion to dismiss stage, the ALJ must accept the facts of Petitioner’s designation and pleadings as true. See *Huffman et al, supra*. The Civil Service System requires dismissal of a SEAC Complaint that does not show such exhaustion. I.C. 4-15-2.2-42(e) (“If a procedural or jurisdictional requirement is not met, the commission [SEAC] shall dismiss the appeal”). See also, *William Reedus v. DWD*, 900 N.E.2d 481, 487 (Ind. App. 2009). That said, SEAC must keep every case for the merits where exhaustion and other requirements are made. I.C. 4-15-2.2.

II. Findings of Fact

The facts relevant to the instant motion’s resolution are discussed. They are taken from the pleadings and designated evidence, as construed in the light most favorable to non-movant Petitioner Johnson:

1. This is a classified Civil Service case. Petitioner Johnson alleges that her 2012 performance evaluation, 2013 raise, and thirty (30) day suspension were handled improperly, lacked just cause, and/or were the unlawful product of harassment or retaliation. Petitioner also alleges that her due process rights were violated by Respondent DWD. DWD contends just cause, with no illegality, supported the employment actions. These merit contentions are reserved for hearing.
2. As to the motion, Respondent DWD alleges that Petitioner Johnson failed to exhaust the first necessary administrative step for SEAC to obtain jurisdiction. Specifically, Respondent alleges that Petitioner did not file her Step I with the agency and, therefore, never reached Step II.
3. On March 7, 2013, Petitioner Johnson signed and dated her Step I civil service employee complaint. (See Petitioner’s Designated Evidence, Exhibit D).
4. Also on March 7, 2013, Petitioner Johnson filed her Step I complaint with Respondent DWD by submitting it to Angela Roosa in the DWD human resources office at approximately 8:45 a.m. (Id.) This is clearly a disputed factual ground (e.g. DWD says ‘we didn’t receive it’ and Petitioner says ‘yes, you did’). (See Petitioner’s brief, Exs. D-E, and Position Paper pp. 4,6.)

5. Petitioner also alleges that DWD's human resources director, Ms. Twyman, eventually confirmed receipt of a partial copy of a Step I complaint. (Id.).
6. Regarding the Step II filing, Petitioner Johnson's briefing is somewhat murkier, but it shows she had multiple contacts with SPD and alleges the filing of her appeal. (See Petitioner's Position on Exhaustion of Step I and Step II).
7. According to Respondent DWD's Motion, Petitioner Johnson received a letter on or about March 11, 2013 from Bruce Baxter at SPD, which rejected/denied the Step II filing because SPD was under the impression that Petitioner had skipped Step I.

III. Conclusions of Law

1. The dispute over Petitioner Johnson's Step I filing is based on a disputed factual ground. Petitioner's designated evidence directly addresses her Step I filing and alleges that Respondent DWD lost the paperwork, thus being sufficient to overcome a motion to dismiss under the standard of review. Respondent DWD's lack of response to Petitioner's Step I filing is deemed a constructive denial, which entitled Petitioner to proceed to Step II.
2. Petitioner Johnson's multiple contacts and alleged filing with SPD, viewed in conjunction with Mr. Baxter's rejection/denial of her Step II filing within approximately five days of her Step I filing, requires the reasonable inference that Petitioner did or would have timely filed her Step II had DWD not (allegedly) misplaced the Step I.
3. SPD's rejection/denial of Petitioner Johnson's Step II filing was based on SPD's belief at the time that Petitioner had not filed Step I with Respondent DWD. However, as found above, Petitioner's briefing creates a question of fact over the Step I filing issue. Therefore, SPD's rejection/denial was a premature or constructive denial. Petitioner is deemed to have satisfied Step II.
4. The papers provided by the parties leave some factual doubts, but any doubts must be resolved in favor of non-movant Petitioner under the standard of review. Motions to dismiss are disfavored and there is a strong preference to reach the merits. See generally, *City of E. Chicago v. E. Chicago Second Century, Inc.*, 908 N.E.2d 611 (Ind. 2009); *Coslett v. Weddle Bros. Constr. Co.*, 798 N.E.2d 859, 861 (Ind. 2003).
5. Prior sections reciting contentions or certain general legal standards are hereby incorporated by reference, as needed. To the extent a given finding of fact is deemed to be a conclusion of law, or a conclusion of law is deemed to be a finding of fact, it shall be given such effect.

IV. Order on Motion

Therefore, Respondent DWD's Motion to Dismiss is **DENIED**. The case shall proceed to a hearing on the merits by separate order.

DATED: October 22, 2013



Hon. Aaron R. Raff
Chief Administrative Law Judge
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